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No. 90-1062

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In the Supreme Court of the United States

OCTOBER TERM, 1990

RAINBOW NAVIGATION, INC., ET AL., PETITIONERS

v.

DEPARTMENT OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the United States has an obligation, under a treaty with Iceland to facilitate their defense relationship, to guarantee the economic viability of a particular maritime shipping business.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 911 F.2d 797. The opinions of the district court (Pet. App. 14a-34a, 35a-48a) are reported, respectively, at 686 F. Supp. 354 and 699 F. Supp. 339.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1990. A petition for rehearing was denied on November 7, 1990. Pet. App. 49a-50a. The petition for a writ of certiorari was filed on January 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1986, the United States and the Republic of Iceland entered into a Treaty[1] and a related Memorandum of Understanding (MOU) to assure that "both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade" of transporting cargo to a United States military base at Keflavik, Iceland. Pet. App. 2b; see *id.* at 1a-5a. Petitioners Rainbow Navigation, Inc., et al., challenged the Department of the Navy's implementation of those agreements. The district court ordered the Navy to give special preference to Rainbow, concluding that the Treaty and the MOU requires the United States to assure Rainbow's "continued economic viability." *Id.* at 34a. The court of appeals reversed, holding that "[n]othing in the Treaty or the MOU, either on their faces or as illuminated during the ratification proceedings, vests any rights in Rainbow, as opposed to the U.S.-flag service generally." *Id.* at 4a.

1. Prior to 1984, the Navy transported military cargo to Iceland on Icelandic ships under common carrier tariffs on file with the Federal Maritime Commission. In 1984, Rainbow began operating a U.S. flag vesel in this trade, filing rates identical to those offered by the Icelandic carriers. As a result of the statutory preference for U.S. flag vessels under the Cargo Preference Laws, 10 U.S.C. 2631, Rainbow soon was transporting 70% of the Navy's shipments. The Government of Iceland strongly protested the

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[1] Treaty Between the United States of America and the Republic of Iceland To Facilitate Their Defense Relationship, Sept. 24, 1986, S. Treaty Doc. No. 31, 99th Cong., 2d Sess. (1986).

exclusion of Icelandic carriers from that portion of the trade. Pet. App. 4a.

In 1985 the Secretary of the Navy attempted to rescind Rainbow's entitlement to preferential treatment on the ground that the freight Rainbow charged was "excessive or otherwise unreasonable" (10 U.S.C. 2631), relying in part on the foreign policy consequences of the preference. The United States District Court for the District of Columbia concluded that the rescission was unwarranted and issued an injunction restoring Rainbow's preference. *Rainbow Navigation, Inc.* v. *Department of the Navy*, 620 F. Supp. 534 (D.D.C. 1985), aff'd, 783 F.2d 1072 (D.C. Cir. 1986). Petitioners remained in control of the bulk of the Icelandic trade, and Iceland announced that if Icelandic ships were excluded from competitive bidding, that nation would enact legislation prohibiting United States vessels from delivering their cargo. See S. Exec. Rep. No. 27, 99th Cong., 2d Sess. 2 (1986).

2. The United States and Iceland entered into the Treaty and MOU to resolve the continuing friction in U.S.-Icelandic relations. See Pet. App. 1b-5b. Under the Treaty, transportation of military cargo in the Iceland trade would be provided "on the basis of competition between United States flag carriers and Icelandic shipping companies" that "shall result in contract awards that ensure that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade." *Id.* at 2b. The Treaty also provided that the percentage allocation of cargo between U.S. flag carriers and Icelandic shipping companies would be determined by agreement between the United States and Iceland. *Ibid.* The agreement is spelled out in the MOU, which provides that each competition

> shall result in contract awards to both an Icelandic shipping company and a United States flag carrier such that not to exceed 65 percent of the cargo shall be carried by the lowest bidder and the remainder shall be carried by the next lowest bidder of the other country, provided that the lowest bidder shall not be precluded from carrying additional cargo if the next lowest bidder of the other country is unavailable.

Id. at 4b. The Treaty and MOU thus create a limited exception to the preference that U.S. flag carriers receive under the Cargo Preference Laws and permit Icelandic shipping companies to compete for up to 65% of the Iceland trade. *Id.* at 5a.

During ratification hearings before the Senate Committee on Foreign Relations, Senator Mathias asked Edward J. Derwinski, Counselor to the State Department, whether "there are any plans in effect to save harmless the current cargo carrier" in light of the Treaty. Pet. App. 5a. Counselor Derwinski answered that

> the current carrier has been involved in a number of discussions with appropriate authorities, and despite the fact that we could not provide, obviously, within the treaty for specific protection for an entity, we did have in mind at all times the need to protect the interests of the current carrier.

Id. at 6a. The Committee Report on the Treaty, the pertinent portions of which had been reviewed and endorsed by Counselor Derwinski, recommended ratification

> only with the assurance of the Departments of State and Defense that * * * the treaty will be implemented in such a way that the existing

> United States-flag service in the Iceland trade would not be disadvantaged as a result of the treaty. The committee received those assurances at its hearing, and recommends advice and consent on that basis only.

The Report further stated that "[t]he committee understands and expects that the economic viability of the United States-flag service will be maintained just as if the 1904 act were fully in effect in the Iceland trade." S. Exec. Rep. No. 27, *supra*, at 3. The Treaty was ratified by the Senate on October 8, 1986. 132 Cong. Rec. 29,520-29,521 (1986).

3. In 1987, the Navy held the first competition under the Treaty. In its Request For Proposals (RFP), the Navy invited Icelandic bidders to submit alternate bids based on carriage of either 65% or 35% of the trade; U.S. bidders, by contrast, were requested to submit alternate bids for either carriage of 65% of the trade or a time charter of the ship (conducted as a small business set-aside) "to meet other requirements of the Government on a worldwide basis" during the contract period. Pet. App. 6a.[2] Ultimately, the Iceland Steamship Company, Ltd. (Eimskip), an Icelandic carrier, won the 65% portion of the award and Rainbow, as the sole U.S. flag bidder, was awarded a time charter. *Ibid.*

In 1988, the Navy's RFP requested both Icelandic and U.S.-flag bidders to submit alternate bids for carriage of either 65% or 35% of the trade. Pet. App. 7a. The 1988 RFP also eliminated the time

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[2] Because of the variety of conditions which might be encountered under the time charter, the 1987 RFP also set forth a variety of restrictive specifications for that service, including 90,000 cu. ft. of underdeck cargo capacity and self-sustaining capability (*i.e.*, a ship with its own cranes).

charter (along with the associated restrictive specifications) and the small-business set-aside. *Ibid.* Instead of submitting a bid, petitioner Rainbow filed the instant suit, claiming that the changes to the 1988 RFP violated the terms of the Treaty and MOU by establishing two competitions for the trade rather than a single competition and by failing to ensure Rainbow's "economic viability." *Ibid.*

The district court issued a temporary restraining order and, later, a preliminary injunction barring the Navy from implementing the 1988 procurement and directing that carriage continue under the terms of the 1987 procurement. Pet. App. 35a-48a & n.30. That court ultimately granted Rainbow's motion for summary judgment, holding that the 1988 RFP violated the terms of the Treaty and MOU. *Id.* at 14a-34a. In the district court's view, the representations made by the Executive Branch to the Senate in connection with ratification of the Treaty "were intended to have the effect of granting to Rainbow, the current carrier, an advantage over what would have been the award process in the absence of such representations" and, thus, "the treaty vested rights in the 'current carrier,' *i.e.*, Rainbow, that override the Navy's * * * emphasis on the most economical means of carriage." *Id.* at 25a-26a. The district court consequently required the Navy to conduct future procurements to ensure that Rainbow "not be disadvantaged on account of the treaty." *Id.* at 34a.[3]

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[3] The specific requirements include a small business set-aside, various restrictive specifications from the 1987 procurement (see note 2, *supra*), and "a time charter arrangement or some other means equally effective to ensure that the continued economic viability of [Rainbow] is maintained as if the Cargo Preference Act of 1904 were fully in effect." Pet. App. 33a-34a. The district court also required "each bidder"

4. The court of appeals reversed. Pet. App. 1a-13a. The court stated that the plain language of the treaty and MOU "require[s] only (1) that the Navy award contracts by means of a competition; (2) in a manner that 'ensure[s] that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade'; and (3) that the lowest U.S. bidder receive at least 35 percent of the cargo." *Id.* at 9a. "The Treaty protects the United States-flag service as a whole, therefore, rather than any particular carrier." *Ibid.* Accordingly, the district court erred in requiring the Navy to impose special requirements "to ensure Rainbow's economic viability." *Id.* at 9a-10a.

The court of appeals observed that Rainbow "relies primarily upon the statements made or endorsed by the Executive Branch during the ratification proceedings" as the source of its asserted right to special treatment. Pet. App. 10a. Assuming "*arguendo* that the Executive's statements during the ratification process are relevant guides to interpretation of the Treaty," the court of appeals concluded that those statements were ambiguous and "cannot be allowed to obscure the meaning of clear Treaty language." *Id.* at 11a. The court also rejected Rainbow's argument that the restrictive specifications in the Navy 1987's RFP "reflect[] the Navy's contemporaneous interpretation of what the Treaty requires," concluding that inclusion of these specifications in the 1987 RFP

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to offer and "be required to provide service capable of carrying at least sixty-five percent of the trade." *Id.* at 33a. That specification prevents smaller U.S. flag carriers from competing with Rainbow (see *id.* at 29a) and has the effect of requiring the government to pay Rainbow as if it were carrying 65% of the trade, even if it is only awarded the 35% portion in a single competition.

"indicates not what the Navy believed the Treaty to require, but only what it believed the Treaty to allow." *Ibid.*

The court of appeals observed that the Navy had not implemented the Treaty "in a manner that makes it impossible or even difficult for Rainbow to qualify as a bidder" and that "[t]he danger cited by Rainbow, and by the district court"—"that domestic competition will edge Rainbow out of the Iceland trade and lead to its replacement by a lower bidding U.S. carrier"—"is not a danger from which Rainbow is entitled to be protected" under the Treaty and MOU. Pet. App. 12a.

ARGUMENT

Petitioners contend that the United States has an obligation, under a treaty between the United States and Iceland to facilitate their defense relationship, to guarantee the economic viability of Rainbow's maritime shipping business. The court of appeals correctly rejected that extraordinary contention. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Petitioners primarily contend that this Court should review the court of appeals' decision because its "opinion contravenes the principle, most recently restated in *United States* v. *Stuart*, [489 U.S. 353] (1989), that extratextual sources are useful and necessary tools of treaty construction." Pet. 11. As an initial matter, "this Court reviews judgments, not opinions," *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), and the court of appeals' judgment in this case is plainly correct. The court of appeals properly concluded that

the Treaty—which by its plain terms ensures that "both United States flag *carriers* and Icelandic shipping companies are able to maintain a viable presence in the trade" (Pet. App. 2b, emphasis added)—"protects the United States-flag service as a whole * * * rather than any particular carrier." Pet. App. 9a.[4]

Moreover, the court of appeals' method of analysis is entirely consistent with *Stuart*. In *Stuart*, this Court held that the 1942 Convention Respecting Double Taxation between the United States and Canada permitted the Internal Revenue Service to issue an administrative summons pursuant to a Canadian government request without first inquiring whether the Canadian tax investigation was directed toward criminal prosecution under Canadian law. See 489 U.S. at 355-356. In reaching that conclusion, this Court examined both the language and the ratification history of the Convention. *Id.* at 365-370.[5] Similarly, the court of appeals in this case examined both the Treaty's language and its ratification his-

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[4] Petitioners' various contentions that the Treaty and MOU were to preserve and protect "the class of U.S. flag vessels previously carrying the military cargo [i.e., Rainbow's vessel]" (Pet. 12), "the past market shares of the U.S. flag and Icelandic companies" (*id.* at 13), "Rainbow's class of vessel" (*id.* at 16), and "the *existing* operator, Rainbow" (*id.* at 17) find no support in the language of the Treaty or the MOU. See Pet. App. 1b, 2b, 4b (referring, without qualification, to "vessels of both countries," "vessels of the United States," and "United States flag carriers").

[5] Justices Kennedy, O'Connor and Scalia concurred in the judgment, concluding that "the text of the Treaty is quite sufficient to decide the issue" before the Court and that reference to the ratification history in the context of that case was unnecessary. See 489 U.S. at 370 (Kennedy and O'Connor, JJ., concurring); *id.* at 371-377 (Scalia, J., concurring).

tory, concluding that "[n]othing in the Treaty or the MOU, either on their faces *or as illuminated during the ratification proceedings*, vests any rights in Rainbow, as opposed to the U.S.-flag service generally." Pet. App. 4a (emphasis added); see also *id.* at 9a, 11a. Plainly, there is no conflict of approach between *Stuart* and the instant case.[6]

Indeed, petitioner's contention that the court of appeals "ignored" or "pa[id] scant attention to" the ratification history (Pet. 12, 16) is manifestly inaccurate. The court was willing to assume, for the purposes of this case, that "the Executive statements during the ratification process are relevant guides to interpretation of the Treaty." Pet. App. 11a.[7] The court disagreed, however, with petitioners' assertions as to the "import" of those statements, correctly explaining that "[a]mbiguous ratification history cannot be allowed to obscure the meaning of clear Treaty language." *Ibid.*[8]

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[6] Although petitioners criticize the court of appeals' reliance on the Treaty's text (Pet. 11-12, 13-14), this Court's decision in *Stuart* places great reliance on the "clear import of treaty language." See 489 U.S. at 365-366. See *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 180 (1982) (quoting *Maximov* v. *United States*, 373 U.S. 49, 54 (1963)).

[7] The court observed that it had doubts as to whether "the specific representations made by the Executive in this case are interpretations of what the Treaty requires, as opposed merely to representations about how the Administration then intended to implement the Treaty." Pet. App. 10a-11a. The court declined, however, to analyze that issue further because "neither appellant has pressed this point" on appeal. *Ibid.*

[8] As that court explained, to the extent that the ratification hictory is unambiguous, it actually supports the government's —rather than petitioners'—interpretation of the Treaty. Pet. App. 9a. Counselor Derwinski stated to the Senate Foreign

Petitioners also contend, incorrectly, that the court of appeals failed to give sufficient consideration to the Navy's 1987 procurement practice. Petitioners argue that "the 1987 RFP represents the considered, contemporaneous understanding of the Navy as to what the Treaty and MOU require" and therefore the Navy could not alter the specifications set forth in that procurement. Pet. 17-19. The court of appeals properly concluded, however, that "the inclusion of these specifications in the RFP for 1987 indicates not what the Navy believed the Treaty to require, but only what it believed the Treaty to allow," and that, therefore, "elimination of those restrictive specifications * * * is not a departure from the Navy's previous interpretation, but merely a reflection of what else * * * the Treaty permits." Pet. App. 11a.[9] The Navy's discontinuance of the time

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Relations Committee that the government "could not provide * * * within the treaty for specific protection for an entity" such as Rainbow. *Id.* at 6a, 9a. Similarly, statements in both the Senate Report and on the Senate floor refer to protection of "the existing United States flag service"—rather than any particular carrier—in the Iceland trade. *Ibid.*, quoting S. Exec. Rep. No. 27, *supra*, at 3; 132 Cong. Rec. 29,521 (1986) (Senator Pell). While Counselor Derwinski noted that the government "did have in mind at all times the need to protect the interests of the current carrier" (Pet. App. 6a), that "interest" is the opportunity—shared with the U.S. flag service as a whole—to compete for Navy procurements.

[9] Petitioners' assertion that the "record stands unchallenged" on this point (Pet. 12-13, 18) is incorrect. The government explained by affidavit in the district court that the Navy included the time charter and associated restrictive specifications in the 1987 RFP because the Navy anticipated that it could make economical use of a vessel possessing those specifications by employing the ship in both the Iceland trade

charter and associated restrictive specifications in the 1988 RFP was entirely reasonable, in accord with the Navy's operational needs and in full conformity with all applicable legal requirements, including the Treaty and MOU.[10]

2. As the court of appeals explained, "the Navy has not implemented the Treaty in a manner that makes it impossible or even difficult for Rainbow to qualify as a bidder for the procurement." Pet. App. 12a. Petitioners simply seek protection from competition *by other U.S. flag service carriers* that can meet the United States' military needs at a lower cost. As the court of appeals correctly observed—and one would reasonably expect—"this is not a danger from which Rainbow is entitled to be protected." *Ibid.* Even if that question were close—and we sub-

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and for other "special missions" worldwide (such as intra-European cargo movements). See C.A. App. 225-229 (Affidavit Of James C. Toland, Captain, USN). The Navy subsequently found, through its experience in using Rainbow's vessel in this manner from July 1987 to January 1988, that the practice "was not economical for the Government" and that it no longer needed "a self-sustaining vessel to serve North Europe." *Id.* at 227. Indeed, the incremental cost of using Rainbow's vessel was "more than double the cost of using the high cost U.S. flag spot charters potentially available at the time." *Id.* at 228. Petitioners' assertion that this affidavit is "belied by internal Navy documents" (Pet. 18) is also incorrect. See C.A. Reply Brief For Federal Appellants at 19-21.

[10] Under general procurement law, the government has an obligation to obtain competitive prices for goods and services (see 10 U.S.C. 2301(a)(1), 2304(a)(1), 2305(a)(1)(A); 48 C.F.R. Ch. 1, 10.002(a)) and to limit the use of restrictive specifications except to the extent "necessary to satisfy the needs of the agency." 10 U.S.C. 2305(a)(1)(B)(ii); 48 C.F.R. Ch. 1, §§ 10.002(a)(3)(ii), 10.004.

mit that it is not—its resolution would be of importance only to the litigants themselves and plainly would not warrant this Court's review. See *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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